

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

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U.S. DISTRICT COURT
DISTRICT OF MASS.

ANTHONY P. SCAPICCHIO
Plaintiff

v.

MOUNT AUBURN PROFESSIONAL
SERVICES, MOUNT AUBURN HOSPITAL,
as administrator of the Mount Auburn Hospital
RetirementPlus 403(b) Plan, and THOMAS
FABIANO

Defendants

CIVIL ACTION NO. 04-11573-RWZ

**AFFIDAVIT OF THE DEFENDANTS, MOUNT AUBURN PROFESSIONAL SERVICES,
MOUNT AUBURN HOSPITAL, AS ADMINISTRATOR OF THE MOUNT AUBURN
RETIREMENTPLUS 403(b) PLAN AND THOMAS FABIANO IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT**

I, Thomas Fabiano, being duly sworn, hereby depose on oath as follows:

1. I am Director of Human Resources at Mount Auburn Hospital, 330 Mount Auburn Street, Cambridge, Massachusetts 02138.
2. I am authorized to submit this affidavit in behalf of the defendants Mount Auburn Professional Services and Mount Auburn Hospital RetirementPlus 403(b) Plan which are collectively hereinafter referred to as "Mount Auburn."
3. This affidavit is made on personal knowledge. The facts set forth in this affidavit would be admissible in evidence. I am competent to testify to the matters stated herein because I am director of Human Resources at Mount Auburn and as such reviewed the claim for benefits made on August 12, 2002 by Anthony P. Scapicchio, hereinafter "Scapicchio."
4. Mount Auburn established a Retirement Plan for employees of Mount Auburn on January 1, 1990.

5. A true copy of the Retirement Plan, hereafter the “plan,” is attached hereto as Exhibit 1.

6. Schedule A to Exhibit 1 lists amendments to the plan but none of the amendments are relevant to this claim.

7. Scapicchio applied for medical staff membership at Mount Auburn on August 26, 1974. A true copy of his application is attached as Exhibit 2.

8. Mount Auburn approved his medical staff membership by a letter dated October 31, 1974, a true copy of which is attached as Exhibit 3.

9. On April 20, 1995, Scapicchio applied to Liberty Life Assurance Co., hereinafter “Liberty,” for long term disability on the basis that he had been unable to work since February 1, 1995 due to progressive depression. A true copy of his long term disability application is attached as Exhibit 4. His attending physician’s statement is attached as Exhibit 5. Mount Auburn’s report of claim is attached as Exhibit 6.

10. Liberty wrote Scapicchio on May 24, 1995 acknowledging receipt of the claim. A true copy of Liberty’s letter is attached as Exhibit 7.

11. Liberty approved Scapicchio’s application by letter dated June 10, 1995, attached as Exhibit 8.

12. Liberty sent Scapicchio on August 9, 1995 a copy of Liberty’s long term disability policy. A true copy of the letter of transmittal and the policy are attached as Exhibit 9.

13. Scapicchio wrote Mount Auburn on December 12, 1995 that the last day he worked was January 12, 1995. A true copy of the December 12, 1995 letter is attached as Exhibit 10. Mount Auburn verified to Liberty by letter dated January 11, 1996, attached as Exhibit 11, that the last day Scapicchio worked was January 12, 1995.

14. The medical staff by-laws of Mount Auburn required that a member of the medical staff on extended absence resign from the staff. Attached hereto as Exhibit 12 is a true copy of the medical staff by-laws for 1999. The provision requiring a member of the medical staff on extended absence to resign has been in effect since 1987.

15. On February 8, 1996, Scapicchio resigned from the medical staff. A true copy of his letter of February 8, 1996 is attached as Exhibit 13.

16. Liberty paid Scapicchio disability benefits continuously between the date of his disability on January 13, 1995 and the date of his maximum benefit duration at age 65 on December 19, 2002. At no time did the benefits stop.

17. Scapicchio wrote Mount Auburn on August 12, 2002. A true copy of his letter is attached as Exhibit 14.

18. Mount Auburn responded to Scapicchio's letter by letter dated October 15, 2003, a true copy of which is attached as Exhibit 15.

19. Scapicchio responded to Mount Auburn's letter by a letter dated October 24, 2002 sent by facsimile on November 4, 2002, a true copy of which is attached as Exhibit 16.

20. Mount Auburn responded by letter dated December 20, 2002, a true copy of which is attached as Exhibit 17.

21. Scapicchio wrote Mount Auburn by letter dated December 23, 2002, a true copy of which is attached as Exhibit 18. Scapicchio at the date of his hire on September 1, 1974 became a participant in defined benefit pension plan that terminated on December 31, 1989. The plan that became effective January 1, 1990 is a defined contribution individual account plan.

22. Mount Auburn replied to the letter dated December 23, 2002 by a letter dated January 21, 2003, a true copy of which is attached as Exhibit 19.

23. Scapicchio reached age 65 on December 18, 2002. The plan balance of his 403(b) account was available to him under Article V, Section 2 at his choice by payment in any form of benefit made available by his investment company.

24. Scapicchio maintained an account at Fidelity Investments for the deposit of contributions to the Section 403(b) account established by the plan. Attached as Exhibit 20 are true copies of Fidelity Investment's statements to Scapicchio for the period January 1, 1995 to December 31, 1996.

25. The statements show the following Mount Auburn contributions:

| | |
|-------------------------------------|------------|
| January 1, 1995 – March 31, 1995 | \$2,698.10 |
| April 1, 1995 – June 30, 1995 | \$3,224.35 |
| June 1, 1995 – September 30, 1995 | \$744.05 |
| October 1, 1995 – December 31, 1995 | \$0 |
| January 1, 1996 – March 31, 1996 | \$0 |
| April 1, 1996 – June 30, 1996 | \$0 |
| July 1, 1996 – September 30, 1996 | \$0 |
| October 1, 1996 – December 13, 1996 | \$0 |

26. The contributions between January 1, 1995 and September 30, 1995 were 20 weeks paid leave of absence for physicians under the Mount Auburn Personnel Policy. The paid leave terminated on October 1, 1995.

27. Upon receipt of his statement from Fidelity Investments October 1, 1995, Scapicchio knew of should have known that Mount Auburn was not contributing to his Section 403(b) account at Fidelity Investments.

This affidavit is made under the penalties of perjury this 3rd day of January, 2005.

Thomas Fabiano

Thomas Fabiano

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